Supreme Court, U.S.
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IN THE

The Supreme Court of the United States

Christine M. Varad,
Petitioner,

v.

Edward J. Barshak, as Chairman
of the Massachusetts Board of Bar Examiners,

and

the United States Department of Education,
Respondents.

On Petition For Writ of Certiorari To The United States Court of Appeals for the First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Christine Varad petitioned for admission to the Bar in Massachusetts. She has a permanent disability adversely affecting the use of her hand and forearm to handwrite. The Bar Examiners administer an examination in handwritten, essay format assessing qualifications of petitioners for Bar admission which functions to exclude Varad from meaningful participation in the testing program. The Board found that Varad had improperly requested an accommodation in testing for her disability. She tested without a handwriting accommodation with the result that the Board recommended to the Supreme Judicial Court that she was unqualified for admission. Varad requested a hearing on her petition pursuant to Rule 3:01 § 5.3 (S.J.Ct). The request was for a hearing was denied and the petition was dismissed.

Varad sued the Board in federal court alleging a violation of Title II of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101 et seq. The Board immediately motioned for a summary judgment and requested a stay of all discovery. The Board's motion for summary judgment was granted pursuant to a District Court opinion that misstated the standard for a summary judgment and made an unprecedented finding limiting requests for disability accommodations in testing. The First Circuit affirmed the based the reasoning of the District Court opinion while conceding, in concert with the Board of Bar Examiners, that the opinion contained errors as to Varad's claims.

1. In light of this Court's recent decision Tennessee v. Lane, 541 U.S. __ (2004), did the state of Massachusetts improperly deny a disabled Bar petitioner Constitutional rights to equal protection and due process of law when it denied her access to a hearing pursuant to Rule 3:01 § 5.3 (S.J.Ct) before dismissing her petition for admission?

2. Where the District Court misstated Fed. R. Civ. P. 56 standard for a summary judgment was the resulting fact-finding process infected by legal error and improperly relied upon by the First Circuit to affirm a summary judgment on the merits based on the reasoning of the District Court opinion.

LIST OF PARTIES

Petitioner (Plaintiff and appellant in Court below): Christine M. Varad

Respondents (Defendants and appellees in Court below): Edward J. Barshak as Chairman of the Massachusetts Board of Bar Examiners, Appeal No. 03-1779 and the United States Department of Education, Appeal No. 03-2706.

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9. In Re Nitanya Grace Andrews, BA-155851
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11. Kelly v. Southern Pacific Co. 419 U.S. 318, 323, 95 S.Ct. 472 (1974)
12. Manning *ex rel.* Manning v. School Bd. of Hillsborough County, 244 F.3d 927, 943 (11th Cir.) *cert. denied*, 534 U.S. 824 (2001)
13. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S.Ct. 1348 (1986)
14. Poller v. CBS, Inc., 368 U.S. 464, 473, 82 S.Ct. 486 (1962)
15. Pullman-Standard v. Swint, 456 U.S. 273, 102 S.Ct. 1781 (1982)
16. Schisler v. Bowen, 851 F.2d 43 (2d Cir. 1988)
17. Tennessee v. Lane, 541 U.S. __ (2004)
18. United States v. General Motors Corp., 384 U.S. 127, 141, n. 16, 86 S.Ct. 1321 (1966)
19. Varad v. Barshak, 261 F. Supp. 2nd 47 (D. Mass. 2003)
20. Vinick v. United States, 205 F.3d 1. 6 (1st Cir. 2000)

21. Willner v. Committee on Character and Fitness, Appellate Division of the Supreme Court of New York, First Judicial Dept., 373 U.S. 96, 83 S.Ct.1175 (1963)

FEDERAL STATUTES

1. Fed. R. Civ. P. 56 et seq.
2. 29 C.F.R. Pt. 1630.11
3. 29 C.F.R. 1630.16, Appendix Section Pt.1630, § 1630.11
4. 28 CFR 35.104
5. 28 CFR 35.130
5. 28 U.S.C § 1254(1)

MASSACHUSETTS STATUTES

1. Rule 3:01 § 5.3 (S.J.Ct)
2. Art. I and X, Mass. Declaration of Rights

OPINIONS BELOW

The decision, lead appeal No. 03-1779, of the United States Court of Appeals for the First Circuit, dated March 30, 2004, is not published, and is set forth in the Appendix at App. 2. The order denying a petition for rehearing en banc, dated May 5, 2004, appears in the Appendix at App. 3. The judgment and opinion of United States District Court for the District of Massachusetts dated April 27, 2002, is published in Varad v. Barshak, 261 F. Supp. 2nd 47 (D. Mass. 2003).

The First Circuit dismissed member administrative appeal No. 03-2706, United States Department of Education, as moot and for lack of jurisdiction as connected with issues arising in lead appeal No. 02-1779, on May 17, 2004 and is set forth in the Appendix at App. 4. A copy of the complaint appears at App. 5.

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the First Circuit, in lead appeal No. 03-1779, Edward Barshak, as Chairman of the Massachusetts Board of Bar Examiners, appellee, denying the petition for rehearing and petition for rehearing en banc, was filed and entered on May 5, 2004, and is now final.

The First Circuit entered a final judgment of dismissal for lack of jurisdiction and mootness, as to member appeal No. 03-2707, United States Department of Education, appellee, on May 17, 2004.

This Court has jurisdiction to review the decisions by writ of certiorari under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution provides in pertinent part:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Fourteenth Amendment of the United States Constitution provides in pertinent part:

"Section 1 . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or

property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Title II of the Americans With Disabilities Act of 1990 provides in pertinent part:
"The term 'public entity' means –
(A) any State or local government;
(B) any department, agency, special purpose district, or other instrumentality of a State . . . " **42 U.S.C. § 12131**.

" . . . no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." **42 U.S.C. § 12132.**

Fed. R. of Civ. P. 56(c) provides in pertinent part:
"Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

28 CFR 35.104 provides in pertinent part: "Disability means, with respect to an individual, a physical or mental impairment that substantially limits one or more of the major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment."

28 CFR 35.130 provides in pertinent part:
"A public entity may not administer a licensing or certification program in a manner that subjects qualified individuals with disabilities to discrimination on the basis of disability, nor may a public entity establish requirements for the programs or

activities of licensees or certified entities that subject qualified individuals with disabilities to discrimination on the basis of disability."

29 CFR Pt. 1630.11 Administration of tests.

"It is unlawful for a covered entity to fail to select and administer tests concerning employment in the most effective manner to ensure that, when a test is administered to a job applicant or employee who has a disability that impairs sensory, manual or speaking skills, the test results accurately reflect the skills, aptitude, or whatever other factor of the applicant or employee that the test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure)."

29 CFR Pt.1630.16, Appendix to Part 1630 Interpretive Guidance on Title I of the Americans with Disabilities Act § **1630.11** Administration of Tests

"The intent of this provision is to further emphasize that individuals with disabilities are not to be excluded from jobs that they can actually perform merely because a disability prevents them from taking a test, or negatively influences the results of a test, that is a prerequisite to the job. Read together with the reasonable accommodation requirement of section 1630.9, this provision requires that employment tests be administered to eligible applicants or employees with disabilities that impair sensory, manual, or speaking skills in formats that do not require the use of the impaired skill. The employer or other covered entity is, generally, only required to provide such reasonable accommodation if it knows, prior to the administration of the test, that the individual is disabled and that the disability impairs sensory, manual or speaking skills. Thus, for example, it would be unlawful to administer a written employment test to an individual who has informed the employer, prior to the administration of the test, that he is disabled with dyslexia and unable to read. In

such a case, as a reasonable accommodation and in accordance with this provision, an alternative oral test should be administered to that individual. By the same token, a written test may need to be substituted for an oral test if the applicant taking the test is an individual with a disability that impairs speaking skills or impairs the processing of auditory information.

Occasionally, an individual with a disability may not realize, prior to the administration of a test, that he or she will need an accommodation to take that particular test. In such a situation, the individual with a disability, upon becoming aware of the need for an accommodation, must so inform the employer or other covered entity. For example, suppose an individual with a disabling visual impairment does not request an accommodation for a written examination because he or she is usually able to take written tests with the aid of his or her own specially designed lens. When the test is distributed, the individual with a disability discovers that the lens is insufficient to distinguish the words of the test because of the unusually low color contrast between the paper and the ink, the individual would be entitled, at that point, to request an accommodation. The employer or other covered entity would, thereupon, have to provide a test with higher contrast, schedule a retest, or provide any other effective accommodation unless to do so would impose an undue hardship.

Other alternative or accessible test modes or formats include the administration of tests in large print or braille, or via a reader or sign interpreter. Where it is not possible to test in an alternative format, the employer may be required, as a reasonable accommodation, to evaluate the skill to be tested in another manner (e.g., through an interview, or through education license, or work experience requirements). An employer may also be required, as a reasonable accommodation, to allow more time to complete the test. In addition, the employer's obligation to make reasonable accommodation extends to ensuring that the test site is accessible. (See Sec. 1630.9 Not Making Reasonable Accommodation) See Senate Report at 37-38; House Labor Report

at 70-72; House Judiciary Report at 42; see also Stutts v. Freeman, 694 F.2d 666 (11th Cir. 1983); Crane v. Dole, 617 F. Supp. 156 (D.D.C.1985).

This provision does not require that an employer offer every applicant his or her choice of test format. Rather, this provision only requires that an employer provide, upon advance request, alternative, accessible tests to individuals with disabilities that impair sensory, manual, or speaking skills needed to take the test.

This provision does not apply to employment tests that require the use of sensory, manual, or speaking skills where the tests are intended to measure those skills. Thus, an employer could require that an applicant with dyslexia take a written test for a particular position if the ability to read is the skill the test is designed to measure. Similarly, an employer could require that an applicant complete a test within established time frames if speed were one of the skills for which the applicant was being tested. However, the results of such a test could not be used to exclude an individual with a disability unless the skill was necessary to perform an essential function of the position and no reasonable accommodation was available to enable the individual to
perform that function, or the necessary accommodation would impose an undue hardship.

Rule 3:01 § 5.3 (S.J.Ct) provides in pertinent part:
"5.3 Non-qualified Applicants. The petitions of those found not qualified shall be dismissed at the expiration of sixty days from the Board of Bar Examiners' report of non-qualification, unless within that period the Chief Justice of the Supreme Judicial Court, on application of the petitioner, shall order a hearing on the matter."

PETITION FOR WRIT OF CERTIORARI

Petitioner, Christine Varad respectfully petitions this Court for a writ of certiorari to review a judgment of the United States Court of Appeals for the First Circuit affirming a summary judgment misstating the standard applied by Federal Rule of Civil Procedure 56 and concluding in an unprecedented decision, that 29 C.F.R. Pt. 1630.11 and 29 C.F.R. 1630.16 Appendix to Pt. 1630, § 1630.11 provide no guidance to define notice in requesting disability accommodations under Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. 12101, et seq. and holding that only accommodation requests made in a format designated by state testing facilities and only as deemed complete by those facilities are proper requests for the purposes of the Americans with Disabilities Act of 1990.

Unless this Honorable Court accepts this case for a writ review, an erroneous decision with national ramifications significantly limiting the rights of disabled persons to access the courts in conflict with this Court's recent decision Tennessee v. Lane, 541 U.S. __ (2004) and to be reasonably accommodated for participation in testing programs will become precedent.

STATEMENT OF THE CASE

Christine Varad petitioned for admission to the bar in the state of Massachusetts. She has a permanent disability adversely affecting the use of her hand and forearm to handwrite. The Board of Bar Examiners administers an examination in a handwritten, essay format to assess the qualifications of petitioners for admission. The Board found that Varad had improperly requested an accommodation in testing for her disability and refused to allow her any accommodation in testing. She tested without a handwriting accommodation with the result that the Board recommended to the Supreme Judicial Court that she was unqualified for admission. Varad requested a hearing on her petition pursuant to Rule 3:01 § 5.3 (S.J.Ct). The request was for a hearing was denied and her petition for admission was dismissed.

Varad sued the Board in federal court alleging a violation of Title II of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101 et seq. The Board immediately motioned for a summary judgment and requested a stay of all discovery. While the stay was in place, Varad again petitioned for admission to the Bar, and again requested an accommodation in testing. The Board found her request form to be incomplete where she did not include discoverable information in compliance with the District Court order. The Board again refused to provide an accommodation, this time claiming that Varad's written request was incomplete absent the required discoverable information. Varad was again barred from participation in the state's testing program. Her petition was again simply dismissed by the Supreme Judicial Court.

The Board's motion for summary judgment was allowed based on a District Court opinion that misstated the standard for a summary judgment. The decision made an unprecedented finding limiting requests for disability accommodations in testing to only those made in the format designated by a testing facility and only those deemed to be complete by that facility. Varad appealed that decision to the First Circuit.

Where Varad was barred by her disability from any meaningful participation in the state licensing testing program, she filed an application with the U. S. Department of Education entitled "False Certification (Disqualifying Status.)" The filing allows the rights of students barred by state law from participating in the profession for which they were educated to be addressed by the Department. Varad earned a law degree yet state law precludes her from practicing law due to her disability where she cannot be fairly tested for admission to the Bar and licensed to practice law. Due to her disability she would never benefit from her degree to earn a living as an attorney.

The U.S. Dept. of Education's False Certification (Disqualifying Status) form required Varad to sign an oath assigning her rights to litigation, under pains and penalties of perjury, to the Department. The Board of Bar Examiners requires completion by signing of a written accommodation request form including an oath conflicting with that assignment by requiring the discharge, release and exoneration of those assigned rights in order to be afforded consideration of her testing accommodation request. Without an

appropriate accommodation in testing, Varad is unable to meaningfully participate in the state-licensing program.

Varad's request was denied by the Dept. of Ed. She appealed that administrative decision as a member appeal to the First Circuit for the reason that the issue arose in connection with the Barshak decision as lead appeal, then pending in the First Circuit.

The First Circuit affirmed the summary judgment in Barshak based the reasoning of the District Court opinion while conceding, in concert with the Board of Bar Examiners, that the opinion contained errors as to Varad's claims. The First Circuit subsequently dismissed the administrative member appeal as moot and for lack of jurisdiction.

In light of this Court's recent decision Tennessee v. Lane, 541 U.S. __ (2004), the state of Massachusetts improperly denied Varad, a disabled bar admission petitioner, access to the court when it refused her a hearing relative to her Bar petition explaining that her disability related issue did not "state a claim upon which relief may be granted."

REASONS TO GRANT THE WRIT

I. THE COURT SHOULD GRANT THIS PETITION IN LIGHT OF ITS RECENT DECISION Tennessee v. Lane, 541 U.S. __ (2004) TO RESOLVE THE QUESTION OF WHETHER THE STATE IMPROPERLY DENIED A DISABLED PETITIONER CONSTITUTIONAL RIGHTS OF EQUAL PROTECTION AND DUE PROCESS OF LAW WHEN IT DENIED HER ACCESS TO A HEARING PURSUANT TO Rule 3:01 § 5.3 (S.J.Ct) BEFORE DISMISSING HER PETITION FOR ADMISSION.

This Court recently concluded in Tennessee v. Lane, 541 U.S. __ (2004), that ADA, Title II, as it applies to the class of cases implicating the fundamental right of access to the courts, constitutes a valid exercise of Congressional authority to enforce the guarantees of the Fourteenth Amendment.

While the Massachusetts Supreme Judicial Court readily allows Rule 3:01 § 5.3 hearings for petitioners requesting "rereads" of

testing responses and resolving issues of character and fitness for admission, See: IN RE: Douglas Scott Stransky, BA- 133330, SJC 08157, IN RE: David Alan Dorfman, BA-119445, IN RE: Nitanya Grace Andrews, BA-132100 (telephone conference hearing), IN RE: Silvia Shih-Han Wong, BA 155851, it does not, however, equally allow similar hearings for disabled petitioners seeking review of requests for reasonable accommodations in testing.

The SJC denied Varad's request for a hearing in connection with her disability and the Board's failure to provide an accommodation on May 28, 2002, stating, "the request for a hearing must be denied for failure to state a claim upon which relied can be granted." See: App. 1. Massachusetts's highest court views requests for hearings by disabled Bar petitioners for review of testing accommodation requests as invalid claims for hearing relief. Conversely, the Court recognizes requests for essay exam "rereads" by non-disabled petitioners as valid requests for hearing relief by the granting those requests. There is no rational basis for the disparate and unequal treatment of hearing requests by disabled petitioners when examined against the Court's treatment of hearing requests by non-disabled Bar petitioners.

In Tennessee v. Lane, this court said that ADA, Title II is aimed at the enforcement of a variety of basic rights, including access to the courts, that call for a standard of judicial review at least as searching, and in some cases more searching than the standard that applies to sex-based classifications, which are subject to a heightened standard of judicial scrutiny. An important governmental objective must be served by the Court's denial of hearings requests by disabled persons. If the SJC routinely grants hearings as to essay exam "rereads" for non-disabled examinees, there is no apparent rational basis to explain the court's refusal to equally grant hearings reviewing disability claims.

The Board of Bar Examiners recognizes claims such that it requires disabled petitioners to complete by signing, a form waiving, exonerating and discharging their rights and interests relative to any and all litigation arising in connection with a disability accommodation request. While in stark contrast, the SJC doesn't consider disabled petitioners have a "claim upon which relied may be granted" when considering whether to allow them

equal protection and due process of law by means of a hearing to address allegations of unfair treatment in testing by the Board.

This Court has historically recognized a right to a hearing in connection with Bar admission petitions as noted in Willner v. Committee on Character and Fitness, Appellate Division of the Supreme Court of New York, First Judicial Dept., 373 U.S. 96, 83 S.Ct.1175 (1963). It would seem reasonable to conclude that this Court intended disabled examinees be included in those persons recognized as retaining such a right. The First Circuit similarly recognized the right to a hearing in In Re Judith Berkan, No. 81-1017, 648 F.2d 1386 (1st Cir. 1981), regarding petitioners requesting admission to the Federal Bar. And the Supreme Judicial Court has said that, "Traditional right to regulate admission of attorneys to the Bar may not be exercised in a way the infringes on the constitutional rights of the Bar applicants." Matter of Jadd, 461 N.E. 2d 760, 391 Mass. 227.

The SJC refusal to provide a hearing to a Varad, denying her stay request and subsequently dismissing her petition stands in direct conflict with Matter of Jadd, Art. I and X, Mass. Declaration of Rights and most recently, Tennessee v. Lane, 541 U.S. __ (2004), stating that ADA, Title II applies to the access to the courts by disabled persons and acknowledging their equal right to fourteenth amendment protections of due process and equal protection of the law.

This Court's review of the Supreme Judicial Court's ruling dismissing Varad's petition for admission without a hearing is necessary to fully examine the validity of Varad v. Barshak, 261 F. Supp. 2nd 47 (D. Mass. 2003) as unprecedented establishment of a basis to similarly deprive of fundamental Constitutional rights to disabled testing program participants on a national scale. State and private testing facilities may now point to the "Barshak effect" to support discriminatory acts depriving disabled test-takers of all ages and levels of education of the right to be fairly tested resulting in substantial obstruction to access opportunities for higher education and meaningful employment.

II. THE COURT SHOULD GRANT THIS PETITION PURSUANT TO SUPREME COURT RULE 10 (a) AND (c) TO RESOLVE THE QUESTION WHERE THE DISTRICT COURT MISSTATED Fed. R. Civ. P. 56 STANDARD FOR A SUMMARY JUDGMENT WAS THE FACT-FINDING PROCESS INFECTED WITH ERROR AND IMPROPERLY RELIED UPON BY THE FIRST CIRCUIT TO AFFIRM THE SUMMARY JUDGMENT ON THE MERITS BASED ON THE REASONING OF THE DISTRICT COURT OPINION.

Part A

In Varad v. Barshak, 261 F. Supp. 2nd 47, the District Court stated it's intent to use the following standard in deciding allowance of Barshak's motion of a summary judgment:
"When considering whether to grant a summary judgment, the Court must determine whether: the pleadings, depositions, answers to interrogatories and admissions on file, if any, show that there is a genuine issue of material fact and that the moving party is entitled to judgment as a matter of law," citing Fed. R. Civ. P. 56(c).

The standard as stated by the District Court in Barshak differs markedly from the accepted Fed. R. Civ. P. 56 (c) standard that provides in pertinent part as follows:
"The judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

Under the generally accepted standard for a summary judgment, if a genuine issue of material fact is found, the moving party is not entitled to a judgment as a matter of law. The following supports the conclusion that the Board of Bar Examiners was not entitled the grant of its motion for a summary judgment.

The threshold requirement to be clearly established by the moving party to prove his basis of entitlement to the grant of a Fed. R. Civ. P. 56 summary judgment motion, is the absence admissible evidence as to material facts supporting the basis or the merits of the of the nonmovant's case against him. See: Poller v. CBS, Inc., 368 U.S. 464, 473 (1962). The Board failed to establish the

absence of admissible evidence supporting the grounds of Varad's cause of action against it to properly invoke the shifting of the burden to her to defend.

To establish the merits, or grounds of a cause of action under Title II of the ADA, Varad first needed to provide the District Court with admissible evidence that she is qualified to participate in the state conducted bar admission testing program. She provided such proof by showing that she is a graduate of an ABA approved law school and that she has received the required passing score on the Multistate Professional Responsibility Examination.

Varad then needed to provide admissible evidence supporting the second element of her cause of action, that she is disabled, within the meaning of 28 CFR 35.104, which provides in pertinent part: "Disability means, with respect to an individual, a physical or mental impairment that substantially limits one or more of the major life activities of such individual; a record of such impairment, or being regarded as having such an impairment." Varad produced the affidavit of Kevin Ho, M.D., which directly evidenced the existence of an injury that resulted in a permanent disability adversely affecting the use of Varad's forearm and hand. The affidavit clearly assessed Varad's inability to engage in the major life activity of handwriting and concluded her ability to perform that skill is severely compromised.

The District Court erred by refusing to follow Bartlett v. New York State Bd. of Law Examiners, 970 F.Supp.1094 (S.D.N.Y. 1997) in acknowledging the Ho affidavit evidence. Bartlett states that "A treating physician's opinion on the subject of a medical disability, i.e. diagnosis and nature and degree of impairment, is (i) binding on the fact-finder unless contradicted by substantial evidence; and (ii) entitled to some extra weight because the treating physician usually is more familiar with a claimant's medical condition than are other physicians."(Schisler v. Bowen, 851 F.2d 43 (2d Cir. 1988). Varad had also produced valid caselaw establishing that U.S. District Courts in Massachusetts have recognized handwriting as major life activity for the purposes of the ADA. See: Agranoff v. Law School Admissions Council, No. 99-12028-RWZ, 10 A.D. Cases 526 (Oct. 1999) (allowing ADA accommodations in testing for a handwriting disabled examinee).

Third, Varad needed to show evidence supporting that the Board subjected and continues to subject her to discrimination on the basis of her disability. She needed to evidence that the established requirements of the state testing program function to preclude her, on the basis of her disability, from being fairly evaluated as to her qualifications for Bar admission and that she is barred from participation in testing on equal footing with non-disabled petitioners, within the meaning of 28 CFR 35.130, which provides in pertinent part:

> "A public entity may not administer a licensing or certification program in a manner that subjects qualified individuals with disabilities to discrimination on the basis of disability, nor may a public entity establish requirements for the programs or activities of licensees or certified entities that subject qualified individuals with disabilities to discrimination on the basis of disability."

Varad provided admissible evidence showing that the state of Massachusetts requires that the qualifications of petitioners requesting admission to the bar be assessed through the employment of a handwritten, essay-formatted test. The test requires the unimpeded use an examinee's hand to enable engaging in the handwriting or typing skills necessary to handwrite or type out the ten essays required for testing assessment. This testing format or method of assessment of petitioner qualifications is nationally utilized by state Bar examination programs.

Varad educed admissible evidence that she functions under a permanent disability adversely affecting the use of her hand and forearm to engage in the skills of handwriting and typing. She supported that the state-testing program requires the use of such skills to properly participate in the testing format and that impairment as to those skills functions to preclude meaningful participation in the testing program on a basis equal with that of non-disabled participants.

She had provided the District Court with admissible evidence that she is qualified to participate in the state conducted testing program and that on the basis of her disability, an injury adversely affecting her ability to engaging in the handwriting and typing skills required for evaluation of her qualifications for admission by

the program's designated testing format, she is effectively barred from full, fair or meaningful program participation.

The District Court had been provided with admissible evidence supporting all of the elements of Varad's cause of action against the Board claiming discrimination on the basis of disability in violation of the ADA. In contrast, the Board failed to establish the absence of admissible evidence as to any of the elements supporting the merits of Varad's claims. Where the Board failed to establish the threshold entitlement to the grant of a motion for a summary judgment in its favor, the District Court erred by granting the motion. See: Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) and again erred by improperly shifting the burden Varad to defend her rights and interests against a summary judgment. See: Matsushita, at 587.

It can be readily and reasonably observed that the qualifications and acquisitions of a bar admission petitioner functioning under a disability adversely affecting the fundamental skills needed to properly participate in the required testing format, i.e. handwriting and typing, will not be accurately evaluated through the employment of an examination format requiring such skills. The District Court erred when it failed to consider admissible evidence before it from an expert in the field of testing and measurement of disabled persons, Peter Behuniak, Ph.D. Mr. Behuniak concluded that there may be no accommodation to functionally evaluate the qualifications of a handwriting-disabled petitioner if such handwriting skills are a part of the evaluation processes. The Board has repeatedly refused to address the issue of whether handwriting related skills are a part of the scoring or evaluation processes of its testing format. Without such fundamental information, neither Behuniak nor Varad would be able to designate a reasonable accommodation. Where Varad is unable to clearly define what skills are being evaluated by the testing format, she is unable to designate a reasonable method to compensate or accommodate her disability within that testing format.

The District Court erred in failing to consider Behuniak's expert opinion stating that if handwriting related skills, such as spelling, punctuation, essay form, sentence form, are part of the test's evaluation and scoring criteria, then Varad's impairment has, and will continue to, adversely affect her ability to fully respond in

testing and would result in an inaccurate measurement of her qualifications for admission.

Edward Barshak, Chairman of the Board of Bar Examiners, is a trial lawyer who focuses on divorce and multi-specialized areas of law while still finding time in a demanding litigation schedule to fit in Bar Chair duties. However, he holds no specialized education relative to the complicated and exacting science of testing and measurement of disabled persons. It was error for the District Court to accept Mr. Barshak's views without equal consideration of Mr. Behuniak's expert opinion. It is also notable that there was a complete absence of evidence provided by the Board illuminating the testing format's scoring methods or evaluation processes and no discovery on that subject was allowed. The District Court acted, at the Board's request, to stay all discovery relative to those material issues. The Board never substantiated or evidenced, that it is now or ever, genuinely able to accommodate Varad in testing while utilizing the handwritten testing format and the Board has repeatedly refused to alter its testing format as an accommodation.

Part B

The Barshak opinion made unprecedented findings that will for the first time substantially limit access by disabled people to reasonable accommodations in testing. State and private examination programs throughout the nation may follow Barshak with the result that disabled examinees will be improperly deprived of their right to participate in testing programs and subjected to discrimination on the basis of their disability in fundamental conflict with the protective intent of the ADA.

Barshak sets the stage for state Bar examining boards and private testing facilities to demand written compliance by disabled testing participators with any requirement, even if unrelated to an accommodation request or unnecessary for valid evaluation of that request. Under Barshak, testing boards may now simply point to their own administrative forms as a powerful disguise for improper discriminatory acts such as needless delay, denial or outright failure to respond to requests by disabled participants for reasonable accommodations in testing. Testing facilities under Barshak may now demand that disabled petitioners complete by signature any

oath or affirmation appearing on request forms while the rights of non-disabled examinees are not equally or similarly burdened. Most importantly, the "Barshak effect" threatens disabled testing participants with utter denial of a reasonable accommodation in testing if they find that they are unable to complete by signing any required oath or affirmation on the face of a testing facility accommodation request form. For example, the Massachusetts Board of Bar Examiners requires disabled bar petitioners to complete the following by signing:

(1) "I understand that full and correct completion (forms A, B, C & D) of this petition for special testing accommodations is a prerequisite for the Board of Bar Examiners' consideration of my request for special testing accommodations."

The first requirement, (1), conflicts with 29 C.F.R. Pt. 1630.11 and 29 C.F.R. 1630.16 Appendix to Pt. 1630, § 1630.11, the only authority available providing specific guidance defining notice requirements for requesting disability accommodations under Title II of the Americans with Disabilities Act. Those EEOC generated regulations strongly support the conclusion that disabled examinees may, right up until the day and hour that the exam is being passed out, be allowed to lodge a timely request for an accommodation in testing if that is the point in time when they are on notice of their need for a testing accommodation. They strongly support that Varad had a right to request an accommodation in testing after the written form deadline date set by the Board if she was put on notice of her need for a testing accommodation after the date designated on that written form.

It is commonly observed that many, many disabled persons deal with physical and mental conditions that are unpredictably subject to change and even unplanned deterioration. Other disabled testing participants may find that they did not fully appreciate the role their disability would play within a testing format or that the testing facility failed to properly inform them of testing evaluation or scoring processes enabling them to provide advance written notification of their need for a testing accommodation. While written accommodation requests are the notification method preferred testing facilities, it was equally recognized by the EEOC that unavoidably human and unpredictable elements rule physical

disabilities rendering strict compliance with deadlines in every case impossible. Accommodations must be made available on a case-by-case basis if they are to meaningfully function to accommodate the needs of disabled testing program participants.

While it is reasonable to allow disabled examinees to request a disability accommodation at any time, right up to the day of testing, it is also clear that testing facilities may not be able to respond to that request on an immediate basis. The Board of Bar Examiners improperly concluded that it is simply relieved of any responsibility pursuant to the ADA as to accommodation requests lodged after its written deadline date. Its policy to freely refuse to provide or acknowledge accommodation requests by disabled participants if submitted past the deadline, in truth, has no rational administrative purpose. Testing facilities can easily require additional time to properly review any request before making the accommodation available to a disabled participant in the next scheduled testing session. A simple rescheduling of the examination of that disabled participant is all that is needed and is very easily accomplished.

The simple act of administrative rescheduling by the Board would have avoided the unwarranted destruction of Varad's studies and employment opportunities and avoided a risk loss of the federal student loan dollars that made that education possible. The "Barshak effect" establishes dangerous precedent allowing this kind of treatment of disabled persons to occur on a national basis, clearing the way for similar adverse effects to the efforts and educations of disabled testing participants of all ages and backgrounds, when there is truly no rational excuse to refuse accommodation requests submitted on a "rolling" basis. Testing of disabled examinees can be easily rescheduled allowing for proper disability accommodation at the next scheduled testing date and time. The "Barshak effect" improperly and unfairly subjects disabled examinees such as Varad to flat denials of accommodation requests by the state testing facilities resulting needless losses in petitioning fees, test preparation costs, loss of subsequent repetitioning fees, retesting preparation fees and loss of employment opportunities and income. There is plainly no excuse for such unconscionable treatment of disabled program participants.

The Massachusetts Board of Bar Examiners could have easily rescheduled testing Varad. It could have changed her testing date to one where an accommodation could have been available to her. She should at least have been granted a hearing on that issue by the SJC before her petition for admission dismissed. A hearing would have provided a forum to address whether the Board had a responsibility to provide her with a disability accommodation at an alternative date and time to allow for proper evaluation of her qualifications for admission.

In total, it was error for the District Court to concluded that 29 C.F.R. Pt. 1630 et seq. and 29 C.F.R. 1630, Appendix Section 1630.11 provide no guidance defining notice for the lodging of accommodation requests. The Barshak opinion erroneously concluded that Varad's requests for an accommodation in testing were just "too little," and "too late." The District Court had recognized that Varad had lodged accommodation requests but erroneously found those requests were improper in form for the purposes of the ADA. That finding is needlessly draconian and results in precedent producing the "Barshak effect." The establishment of a basis to substantially harm the rights of disabled examinees without any genuine administrative purpose in conflict with the intention of the ADA to protect disabled persons from being subjected to disparate treatment on the basis of their disability. Requiring state testing facilities to simply reschedule the testing of disabled participants poses no prejudice to the rights of non-disabled petitioners and no burden on the testing facilities.

The Board further requires disabled bar petitioners to complete the following by signing:

> "I hereby release, discharge and exonerate the Board and/or it designee(s) and/or any persons to whom information may be provided pursuant to this Authorization and Release from any and all liability of every nature and kind arising out of furnishing or receipt of such information made by or on behalf of the Board."

This requirement allows the Board to force disabled examinees to either accept that they will be denied a reasonable accommodation in testing or agree to sign away their right to question the Board's accommodation request decision or any related issues arising in connection with their disability

accommodation request. The "Barshak effect" provides for discriminatory administrative practices harming the interests of the very people the ADA was enacted to protect and those harms are now capable of repetition on a national basis.

As one example, Varad filed an application with the U. S. Department of Education entitled "False Certification (Disqualifying Status)." The form required her to complete by signing an affirmation assigning her rights to litigation, under pains and penalties of perjury, to the U.S. Department of Education. Varad complied and assigned her rights to the Department. The Board of Bar Examiners' requires Varad to complete by signing an affirmation relative to those same rights and improperly burdens her ability to be accommodated for participation in the state-testing program. She is unable to complete by signing an affirmation releasing, exonerating and discharging rights that she has assigned to the Department of Education under pains and penalties of perjury. Yet the Board is allowed to threaten her with a denial of any consideration of her accommodation request should she fail to sign away rights that are no longer exclusively hers to release, discharge or exonerate.

Another example is related to admission petition "background checks." The Board refuses to allow disabled petitioners to authenticate or contest information it has obtained in a background check and it does not make known to them the identity of any information provider it has consulted. Disabled petitioners are forced to sign away their right to defend themselves against false statements or harmfully inaccurate character assessments that may have a profound effect on their ability to earn a living. In fact, it may be true that state Bar exam testing scores are more accurately a function of background check scores than essay writing skills. Disabled petitioners should not then be forced to release their right to defend themselves against unsubstantiated information from unconfrontable sources.

The District Court analysis in Barshak was based on a misstated Fed. R. Civ. P. 56 standard. The Court's fact-finding process was infected by that error resulting in a denial of Varad's Constitutional rights to substantive and procedural due process of law.

This Court's view of findings of fact made under an erroneous view of controlling legal principles has been followed many times. See: Kelley v. Southern Pacific Co., 419 U.S. 318, 323 (1974); United States v. General Motors Corp., 384 U.S. 127, 141, n. 16 (1966); United States v. Singer Manufacturing Co., 374 U.S. 174, 194, n. 9 (1963); United States v. Parke, Davis & Co., 362 U.S. 29, 44 (1960) ("As the majority acknowledges, where findings of fact are made under an erroneous view of controlling legal principles, the clearly erroneous rule does not apply, and the findings may not stand.").

Varad was entitled to a decision applying the substantively correct standard when ruling on Barshak's dispositive motion for a summary judgment. Varad was again denied due process of law when the First Circuit ignored the District Court's Fed. R. Civ. P. 56 misstatement of law before beginning a process of fact finding that involved filtering or extrapolating of fact and law to isolate selective elements of the Barshak reasoning that might still appear to properly support an affirmation while simultaneously acknowledging, in concert with the Board of Bar Examiners, the existence of numerous instances of District Court error.

Whether the Board of Bar Examiners intended to engage in unlawful discrimination with unconscionable effects to disabled examinees by enforcing policies in conflict with ADA protections was a determination properly made by a District Court, not an Appellate panel, through the application of the correct legal standard of review. See: Dayton Board of Education v. Brinkman, 443 U.S. 526, 534 (1979) ("Treating issues of intent as factual matters for the trier of fact is commonplace.")

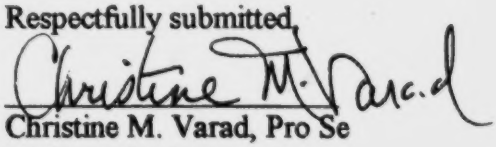
The Massachusetts Supreme Judicial Court and sub department, Massachusetts Board of Bar Examiners employ administrative policies that result in unacceptable discrimination adversely affecting the rights of disabled program participants. This Court's review of this petition could prevent the "Barshak effect" from opening the door to testing facility discrimination, capable of repetition on a national basis, that will substantially limit the rights of disabled test-takers to fully participate in state and private testing programs and harming their ability to become employed or access higher education.

CONCLUSION

For the reasons stated, Christine M. Varad respectfully requests that its petition for writ of certiorari be granted.

June 4, 2004

Respectfully submitted,



Christine M. Varad, Pro Se
88 Greenfield Lane
Scituate, MA 02066
(781) 545-7077

Appendix. 1

Supreme Judicial Court
Boston, Massachusetts 02108

Margaret H. Marshall
Chief Justice

May 28, 2002

Christine Varad
88 Greenfield Lane
Scituate, MA 02066

Dear Ms. Varad,

As a result of your letter of May 2, 2002 requesting a hearing pursuant to S.J.C. Rule 3:01, subsection 5.3, I have reviewed your correspondence with the Board of Bar Examiners and with staff of this court. Upon consideration of all of the materials, I have concluded that your request for a hearing must be denied for failure to state a claim upon which relief can be granted.

As you know, if you decide to take a future Massachusetts bar examination, you can request that the Bar Examiners provide special accommodations in order to alleviate your test-taking problem.

Best wishes for the future.

Yours sincerely,

"/s Margaret H. Marshall"

Margaret H. Marshall
Chief Justice

MHM/pg
cc: Edward J. Barshak, Chair
Board of Bar Examiners

Appendix. 2

Not for Publication in West Federal Reporter
Citation Limited Pursuant to 1st Cir. Loc. R. 32.2

United States Court of Appeals
For the First Circuit

No. 03-1779

Christine M. Varad
Plaintiff, Appellant,
v.
Edward J, Barshak,
Defendant, Appellee.

Appeal from the United States District Court
For the District of Massachusetts
(Hon. Robert B. Collings, U.S. Magistrate Judge)

Before Torreulla, Circiut Judge.
Cyr and Stahl, Senior Circuit Judges

Christine Varad on brief pro se.
Thomas F. Reilly, Attorney General, and Maite Parsi, Assistant Attorney General, on brief for the appellee.

March 30, 2004

Per Curiem. This pro se appellant, Christine Varad, appeals from a decision granting summary judgment for the appellee, Edward Barshak. Varad v. Barshak, 261 F.Supp. 2d 47 (D. Mass. 2003). After careful review of the parties' contentions in light of the record, we affirm in decision on the Title II claim under the Americans with Disabilites Act, 42 U.S.C. § 12142, substantially for the reasons stated in the district court's thorough opinion. The appellee apparently concedes that the court's ruling on Varad's remaining claims were erroneous and argues that they should be

rejected on the merits. We agree. As the court's discussion of the facts indicates, 261 F. Supp. 2d at 48-52, these claims were meritless.

Affirmed.

MANDATE

United States Court of Appeals
For the First Circuit

No. 03-1779
DC. No 02-11311

Christine Varad,
Plaintiff, Appellant,
v.
Edward J. Barshak,
Defendant, Appellee.

Before

Boudin, Chief Judge,
Torruella and Selya, Circuit Judges,
Cyr and Stahl, Senior Circuit Judges,
Lynch, Lipes and Howard, Circuit Judges.

ORDER OF COURT
Entered: May 2, 2004

The petition for rehearing having been denied by the panel of judges who decided the case and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and petition for rehearing en banc be denied.

Appendix. 4

Cerified and issued as Mandate under Fed. R. App. P. 41

By the Court:
Richard Cushing Donovan, Clerk

"s/ Richard Cushing Donovan, Clerk"

"s/ Mark R. Syska"

_____
Deputy Clerk
Date: 5/12/04
[cc: Christine Varad, Maite Parsi}

By: _____
Chief Deputy Clerk

United States Court of Appeals
For the First Circuit

No. 03-2705

Christine Varad;
Petitioner,
v.
Rod Paige, U.S. Dept. of Ed., et al.,
Respondents.

Before
Boudin, Chief Judge,
Lipez and Howard, Circuit Judges.

JUDGMENT
Entered: May 17, 2004

In this appeal, petitioner seeks review of a Department of Education decision denying her a discharge of her student loan under Federal Family Education Loan program. On January 7, 2004, this court issued an order directing petitioner to show cause why this court has jurisdiction over her petition. Petitioner has filed her response, an we now dismiss the appeal for lack of jurisdiction.

We agree that 20 U.S.C. § 1234g(b) does not apply. Nonetheless, the jurisdictional statutes on which petitioner relies confirm that the

district court – not this court—has jurisdiction over the petition. See: e.g. 20 U.S.C. §1082(a)(2)(providing that the Secretary of the Department of Education may "sue and be sued" in any district court, which "shall have jurisdiction of civil actions arising under this part [20 U.S.C. §1071 et seq.]"); Bartels v. Alabama Commercial College, Inc., 54 F.3d 702, 706 (11th Cir. 1995) (finding that §1082(a)(2) grants district courts jurisdiction over suits involving federal student loan program); see also 28 U.S.C. §1331 (providing for district court jurisdiction over "all civil actions arising under the ...laws...of the United States").

We decline to transfer the appeal under 28 U.S.C. § 1631, both for because petitioner could timely file her suit in district court, and because her suit appears to lack any merit, essentially for the reasons stated in the Department's decision dated August 30, 2003, Haugh v. Booker, 210 F.3d 1147, 1150 (10th Cir. 2000)(indicating that transfer is not "in the interest of justice"if the appellant could timely file the appeal in the proper court or if the case appears meritless).

We dismiss the appeal for lack of jurisdiction and deny petitioner's remaining claims for relief as meritless or moot.

By the Court:
Richard Cushing Donovan, Clerk
"/s Mark R. Syska"
By:_____
Chief Deputy Clerk

[cc: Messrs. Jones, Sullivan and Ms. Varad]

Appendix. 6

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

No.: 02-11311 MTW

Christine M. Varad,
Plaintiff,

v.

COMPLAINT

Edward J. Barshak, as Chairman of the
Massachusetts Board of Bar Examiners,
Defendant.

Plaintiff Christine M. Varad alleges the following:

PARTIES

1. Plaintiff is a citizen of the United States residing in the District of Massachusetts at 88 Greenfield Lane, in Scituate, Plymouth County. Plaintiff is, and at all relevant times was, an "individual with a disability" within the meaning of the Americans with Disabilities Act in that she has an injury effecting the use of her arm and hand effecting a handicap which substantially limits at least one of her major life activities, the activity of handwriting.
2. Defendant Edward J. Barshak, as Chairman of the Massachusetts Board of Bar Examiners is the appointed officer of the Supreme Judicial Court of Massachusetts charged by the Court to conduct the State of Massachusetts Bar Examination and to determine the acquisitions and qualifications of Massachusetts Bar examination applicants through the employment of an essay examination and to make a final report to the Court based on the assessments of the examination regarding the qualifications and acquisitions of applicants of the State of Massachusetts Bar Examination for admission to the practice of law.

JURISDICTION

3. Plaintiff is alleging a violation of her civil rights under the Americans with Disabilities Act of 1990, 42 U.S.C.A. § 12101 et seq. ("ADA").
4. This court has jurisdiction over the present case under 28 U.S.C.A. § 1331, which grants the federal district courts original jurisdiction over all civil actions arising under the Constitution, laws, or treaties of the United States.
5. This court has jurisdiction under 28 U.S.C.A. § 1343(a)(4) which grants the Federal District Courts original jurisdiction over any civil action authorized by law to be commenced by any person to recover damages or secure equitable relief or other relief under any Act of Congress providing for the protection of civil rights.
6. This court has jurisdiction under 28 U.S.C.A. § 1367(a) which grants the Federal District Courts supplemental jurisdiction over all other claims that are so related to claims in the action that they form part of the same case or controversy under Article III of the United States Constitution.
7. Venue is proper under 28 U.S.C.A. § 1391(b)(2), as all of the events giving rise to this claim occurred within the District of Massachusetts.

CAUSE OF ACTION

8. Plaintiff is a qualified individual with a disability within the meaning of the Americans with Disabilities Act of 1990 (ADA) in that she has a disability, an injury effecting the use of her arm and hand resulting in a handicap, which substantially limits at least one of her major life activities, the activity of handwriting.
9. Defendant Edward J. Barshak, as Chairman of the Massachusetts Board of Bar Examiners did not make a valid, accurate or fair assessment of the Plaintiff's acquisitions and qualifications for admission to the Bar as an attorney at law through the employment of the Massachusetts Essay Examination where the Plaintiff has a serious and permanent disability effecting her ability to engage in the major life activity of handwriting for prolonged periods of time.

10. All of Petitioner's responses to the State of Massachusetts Essay Examination questions were impaired due to a physical disability and did not reflect a valid assessment or a true evaluation of petitioner's qualifications and acquisitions for admission as an attorney and therefore should not have been used by the Board to make report to the Court relative to the qualifications of Plaintiff or accepted as a valid assessment by the court resulted in Plaintiff being damaged by a resultant denial of admission to the practice law.
11. The actions of the Board of Bar Examiners as state government entities in failing to accommodate the Plaintiff after an oral request for accommodations on the essay portion of the February 2002 Massachusetts Bar Examination made early in January of 2002 were acts in violation of Americans With Disabilities Act of 1990 (ADA) 42 U.S.C. §§ 12101-12189 Title II (1994) for the reason that it placed additional burdens on Petitioner as a disabled Bar examinee, forced her to be tested on an unequal basis, caused injury to the disabled arm and hand, caused Petitioner to suffer undue financial loss and loss of ability to gainfully engage in employment in her chosen profession.
12. The actions of the Board of Bar Examiners as administrators of licensing examinations in failing to accommodate the Plaintiff after her oral request for accommodations on the essay portion of the February 2002 Massachusetts Bar Examination as made early in January of 2002 were acts in violation of Americans With Disabilities Act of 1990 (ADA) 42 U.S.C. §§ 12101-12189 Title III (1994) for the reason that it placed additional burdens on Petitioner as a disabled Bar examinee, forced her to be tested on an unequal basis, caused injury to the disabled arm and hand, caused Petitioner to suffer undue financial loss and loss of ability to gainfully engage in employment in her chosen profession.
13. The actions of the Board of Bar Examiners in failing to accommodate the Plaintiff after her oral request for accommodations on the essay portion of the February 2002 Massachusetts Bar Examination as made by Plaintiff early in January of 2002 were acts in violation of Article 114 of the Articles of Amendment to the Massachusetts Constitution. The Board of Bar Examiners January 2002 actions failing to provide appropriate testing accommodations caused Petitioner to be excluded from

participation as a member of the Massachusetts Bar due solely to her disability and denied her the benefits of Bar membership as a professional licensing program carried on within the Commonwealth of Massachusetts due to a handwriting disability where she is otherwise qualified for membership.

14. The actions of the Board of Bar Examiners in failing to accommodate the Plaintiff after her oral request for accommodations on the essay portion of the February 2002 Massachusetts Bar Examination as made by Petitioner early in January of 2002 were a violation M.G.L. c. 93 § 103. The actions of the Board of Bar Examiners denied Petitioner equal protection of the law by forcing her to be tested for professional licensing on an unequal basis due to a handwriting disability.
15. Assessment of Plaintiff's ability to write as qualification as an attorney can not be properly or functionally assessed by alternative means of testing such as oral responses to essay questions through the use of a Dictaphone or Court stenographer, as suggested by the Board of Bar Examiners as an alternative testing environment, for the reason that the proffered oral examination accommodation would still be graded under the written examination standard and therefore remains an unfair evaluation and does not present an equal testing basis or accommodation. In addition subjective assessments of the Plaintiff's writing abilities as qualification for admission as an attorney cannot be fairly ascertained through the administration of an oral test in place of the required hand written essay examination. Therefore the Board of Bar Examiners failed to accommodate Petitioner on the February 2002 examination and continues to fail to accommodate or provide suggestions for equal accommodations in future testing situations.
16. The Board has failed to provide Plaintiff with a viable, fair and equal testing accommodation on which to base future testing evaluation of the Plaintiff for admission as an attorney. The Board continues to deny Petitioner equal protection of the law, her rights under the ADA and a fair and equal basis on which to be tested for professional licensing in the Commonwealth of Massachusetts.
17. Pursuant to 29 C.F.R. Pt. 1630 et seq. and 29 C.F.R. Pt. 1630, Appendix Section 1630.11, Plaintiff was under no obligation to provide the Defendant with a written request for disability accommodations for the reason that the Plaintiff did not have

seventy-five days of notice prior to the February 2002 testing date of the necessity for disability accommodations on the State of Massachusetts Bar examination.

18. The Board actions of unfairly and unlawfully advising Petitioner early in January of 2002 that the filing by Plaintiff of a written request for disability related accommodations after the required filing period had passed would be futile and that the Board would not act on such a petition even if submitted thereby causing Plaintiff to act in accordance with their direction and not file a written request for accommodations relative for the February 2002 examination. The actions of the Board constitute a full denial to provide reasonable accommodations relative to Plaintiff's disability where the Board was fully informed orally of the nature and extent of the disability and the necessity for a related accommodation prior to the February 2002 exam.
19. Upon information and belief defendant The Massachusetts Board of Bar Examiners is a recipient of federal assistance within the meaning of 42 U.S.C.A. sec. 2000d and 29 U.S.C.A. sec. 794(a), (b)(3)(A)(i)(ii). These statutes provide that no otherwise qualified individual with a disability may be solely by reason of her disability be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal assistance. Defendants have violated Plaintiff's rights by failing to provide reasonable accommodations relative to her as a test-taker of the State of Massachusetts Bar Examination and where Plaintiff is otherwise qualified to be admitted to the practice of law, and her disability poses no health or safety risk to the public in the practice of law, the Board has, based solely on her disability unlawfully denied her access to the practice of law in the State of Massachusetts.
20. Plaintiff's test score was determined through calculations involving an average scaled score for normal non-disabled examinees and that standard is by definition unequal and places Plaintiff on an unfair testing ground by comparing her test result through a scale that represents all other normal, non disabled examinees not tested under any disability. Plaintiff's test results should have been scaled relative to an average or normal scaled score as adjusted for a disabled examinee with a disability similar to that under which Plaintiff was tested.

21. The Board's actions requiring Plaintiff to propose any future testing reasonable accommodations to be allowed for future testing situations constitutes a continuing denial of accommodation as required by the ADA for the reason that the Board is the only party that knows what qualifications and acquisitions the examination is intended in purpose and design to assess. Plaintiff can not be expected to assume any responsibility suggesting reasonable accommodations that might be approved by the Board where she does not know if the Board is assessing her ability to write an essay, her ability to engage in legal analysis or her ability to engage in factual analysis in relation to her qualifications to be admitted to the practice of law and also in relation to the physical disability as accommodated through any proposed accommodated test response situation.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for judgment as follows:

1. Find that the Defendants discriminated against the Plaintiff based solely on her disability in violation of the Americans With Disabilities Act and that the Plaintiff is otherwise qualified to be admitted to the practice of law.
2. Find that the actions of the Defendants unlawfully discriminated against the Plaintiff in violation of the Americans With Disabilities Act of 1990.
3. Find that the actions of the Defendant unlawfully discriminated against the Plaintiff in violation of Article 114 of the Articles of Amendment to the Massachusetts Constitution.
4. Find that the actions of the Defendant unlawfully discriminated against the Plaintiff in violation of M.G.L. c. 93 § 103.
5. Find that the Plaintiff's disability poses no health or safety risk to the public as relative to the practice of law.
6. Find that the major life activity of handwriting is not an essential element to the ability to engage in the practice of law.
7. Order the Defendants to waive the State of Massachusetts Bar Examination and based on Plaintiff's test results of the February

2002 Bar Examination MBE and MPRE, report to the Court that Plaintiff is qualified to be admitted to the practice of law.

8. Order the Defendants to retest Plaintiff with a Massachusetts State Bar Examination that uses a testing format that does not involve her disability.
9. Order the employment, in all future testing of the Plaintiff, of any and all disability accommodations determined to be appropriate and fair by the Court.
10. Order the Board to combine for a total testing result, any new Massachusetts State Essay Bar Examination test result, with Plaintiff's test result from the February 2002 Bar Examination MBE, should the Board make any report to the Court as to Plaintiff's qualifications to be admitted to the practice of law.
11. Order the Board to assume all costs and any and all related costs of retesting of the Plaintiff as required by the Board for admission of Plaintiff to the practice of law in the State of Massachusetts.
12. The Court should order the Defendant to reevaluate, through the employment of a disability accommodation that functions as a re-scoring of Plaintiff's responses to the February 2002 Mass. Bar examination. As relative to such an accommodation, the Court should approve the average scaled score for normal non-disabled examinees and any average or normal scaled score as adjusted for a disabled examinee with a disability similar to that under which Plaintiff was tested. The Court should then order that Plaintiff's scaled Mass. Bar Exam score as adjusted relative to the disability be combined with Plaintiff's scaled test results from the February 2002 Bar Examination MBE and that that score then be reported by the Board to the Court as a fair and equal assessment of Plaintiff's qualifications to be admitted to the practice of law.
13. Award Plaintiff compensatory damages and or exemplary damages due to defendant's discriminatory actions, in an amount to be by the Court, including the loss of earning capacity while prohibited from engaging in work related to her chosen profession, the practice of law.
14. Order Defendants to take all steps necessary to ensure the full enjoyment of all rights guaranteed to Plaintiff under the Americans with Disabilities Act, including any appropriate injunctive relief provided under the ADA.

15. For an order awarding Plaintiff her costs of suit, including litigation expenses, out-of-pocket expenses and if appropriate, reasonable attorney fees in accordance with all provisions of law.
16. Grant Plaintiff any additional legal or equitable relief as this Court deems to be just and appropriate.

DEMAND FOR JURY TRIAL

Plaintiff hereby Demands a Jury Trial in this Action.

Respectfully Submitted,

Date: 07/01/02

"s/ Christine Varad"
Christine M. Varad
88 Greenfield Lane
Scituate, MA 02066
(781) 545-0707

Appendix 14

United States District Court
District of Massachusetts

Christine M. Varad,
Plaintiff,
v. Civil Action No. 2002-11311-RBC[1]
Edward J. Barshak,
as Chairman of the Massachusetts Board of Bar Examiners,
Defendant.

Memorandum and Order on Motion by Edward J. Barshak for Summary Judgment (#24)

Collings, U.S.M.J.

I. Introduction

On July 1, 2002, *pro se* plaintiff Christine M. Varad ("Varad" or "the plaintiff") filed a complaint naming as the sole defendant Edward J. Barshak ("Barshak") in his capacity as the Chairman of the Massachusetts Board of Bar Examiners. The plaintiff claims to be a qualified person with a disability within the meaning of the Americans with Disabilities Act of 1990 ("ADA") and that, as such, she was entitled to certain accommodations with respect to the essay portion of the February 2002 Massachusetts Bar Examination. Varad contends that the defendant's failure to afford her such accommodations based on her oral request made in January, 2002, constituted violations of the ADA, Article 114 of the Articles of Amendment to the Massachusetts Constitution, and Massachusetts General Laws chapter 93 § 103.

Barshak filed a motion for summary judgment (#22) and a memorandum in support (#24) thereof in mid-January, 2003, seeking the entry of judgment as a matter of law on all of the plaintiff's claims. On January 31, 2003, Varad timely submitted a memorandum in opposition (#25) to the dispositive motion. Oral argument on the summary judgment motion was heard on February 24, 2003, and the matter was taken under advisement. With the

---

[1] With the parties consent, this case has been referred and reassigned to the undersigned for all purposes, including trial and the entry of judgment, pursuant to 28 U.S.C. § 636(c).

record now complete, the motion for summary judgment is poised for resolution.

II. The Facts

Unless otherwise noted, the recited facts are not the subject of dispute. Varad is a 2001 graduate of the New England School of Law.(#25, Exh. B ¶2) In July of 2001 and February of 2002 she took the examination for admission to the bar of the Commonwealth of Massachusetts; she failed both exams. (#25. Exh. B ¶¶7, 18,26)

The Board of Bar Examiners ("BBE") is the entity in the Commonwealth responsible for the administration of the bar examination and for "reporting to the Supreme Judicial Court the character, acquirements and qualifications of those petitioning for admission to the Bar." The Massachusetts bar examination is administered over a two day period. On the first day, the Multistate Bar Examination ("MBE") consisting of 200 multiple choice questions is given. The second portion of the exam on day two is "ten questions based on statements of facts, each calling for an "essay" type answer." (#24, Exh. A ¶¶ 12-13)

The BBE provides information and application materials to bar applicants. The application materials for the July 2001 bar examination included a document entitled "Notice and Information Regarding the Next Bar Examination, July 2001 Examination." (#24, Exh. A ¶6 and Exh. A-2) This document supplied information regarding, among other things, the place and time of the examination, the filing of completed applications, and eligibility requirements for taking the bar examination. (#24, Exh. A ¶10 and Exh. A-2) Also included was a section entitled "Special Accommodations" which reas as follows:

> **All requests** for taking the Massachusetts Bar Examination under non-standard conditions must be **in writing** and submitted to the **Board of Bar Examiner, 77 Franklin St., Boston, MA 02110**. Upon receipt of written request, the Board will issue to the applicant Special Accommodation Petition forms. These forms must be completed by the applicant and professionals to provide details and documentation relating to a disability and shall be returned to the Board 75 days prior to the date of examination (**May 14, 2001**). *Written requests* to type the essay protion of the examination will be permitted to persons with disabilities and then to others if seating is available. **DO NOT SEND**

SPECIAL ACCOMMODATIONS (SIC) OR SPECIAL ACCOMMODATIONS (SIC) FORMS TO THE COURT.

Memorandum in Support #24, Exh. A at Exh. A-2 (emphasis in original). It is uncontested that the plaintiff received this information along with the application form and instructions for first time applicants.(#24,Exh. A ¶¶7-8, 10 and Exh. A-2) While Varad properly completed and filed all of the appropriate forms to sit for the July 2001 bar examination, she did not submit a written request or fill out a Special Accommodation Petition form. (#24, Exh. A ¶ 11)

Some weeks prior to the bar examination the BBE sent all applicants a document entitled "Suggestions on Writing the Essay Examination" which document was also "included in the packet given to testtakers at the time of the [e]xamination."(#24, Exh. A ¶16 and Exh. A-4) In addition to suggesting tips on how to formulate and draft answers for the essay portion of the bar exam, this document also explained that "the purpose of the bar examination is to test your ability to think as a lawyer."(#24, Exh. A ¶16 and Exh. A-4) The document further reads:

> The Board presumes that you have completed your law studies, under competent instructors, and have passed examinations given by them. It does not challenge the results of your law school course. It is testing your ability to apply what you have already learned to the facts of the problems such as those which might arise in your practice, and which, in some instances, involve more than one field of law. The value of an answer depends not only upon your conclusions, but even more upon the evidence it displays of the elements mentioned above.

Memorandum in Support #24, Exh. A and Exh. A-4.

The Plaintiff took the two day bar examination in July, 2001, and completed the entire examination. (#24, Exh. A ¶18) In a form letter dated November 2001, Barshak informed Varad that she "did not obtain a total combined scaled score of 270.00 or greater, the passing score, on the July 25-26, 2001 Massachusetts law examination." (#24,Exh. A ¶18 and Exh. A-5) In response, by letter dated November 3, 2001, the plaintiff requested that the BBE sent her copies of her essay answers and also inquired as to the existance of "any designated mechanism by which essay results may be challenged." (#24, Exh. A 19, and Exh. A-6)

In a November 5, 2001 letter the Executive Director of the BBE, Elaine Vietri (hereinafter "Vietri"), advised Varad that "[t]he Board of Bar Examiners has reviewed our calculations of your scores and found them to be accurate and complete, all ten essays were graded and included in the calculated essay score." (#24, Exh, A ¶20 and Exh. A-7) The letter further stated that "the Rules of the Board of Bar Examiners do not allow for a rereading of [plaintiff's] essay answers of the July 2001 bar examination" because Varad's total scaled score was "below the 265 necessary for a reread." (#24, Exh. A ¶20 and Exh. A-7)(emphasis in original)

In due course the plaintiff applied to take the February 2002 examination for admission to the bar of the Commonwealth of Massachusetts. (324, Exh. A ¶21 and Exh. A-9) The reapplication packet included information similar to that sent with respect to the July 2001 bar exam, including a section entitled "non-standard testing" delineating the procedures for requesting a special accommodation.[2] (#24, Exh. A ¶22 and Exh. A-10) Specifically the pertinent parts of this section read:

> If you have a disability that will require special accommodations on the bar examination and have not previously been granted accommodations, you must complete and file the Special Accommodations Petition forms... The applicant and professionals must complete these forms to provide the Board with details and documentation relating to the disability. The Special Accommodations Petition shall be returned to the Board no later than 75 days prior to the date of examination (December 17, 2001)....

Memorandum In Support #24,Exh. A ¶ 22 and Exh. A-10 (emphasis in original).

The plaintiff did not request any accommodations by December 17, 2001 or file a special accommodation petition with reference to the February 2002 examination. (#24, ¶23)

On January 18, 2002, Varad spoke with Vietri at the BBE by telephone and requested an accommodation for a handwriting

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[2] Varad also again received the document entitled "Suggestions on Writing the Essay Examination" twice before the exam was administered, (#24 ¶ 24)

disability.[3] (#25, Exh. B ¶9) According to the plaintiff, her request was denied, (#25, Exh.B ¶10) She consequently took the February 2002 examination without any accommodations and wrote out all responses to the ten essay questions.(#24, Exh. A ¶25 and Exh. A-25)

The BBE informed the plaintiff on May of 2002 that she had not attained the required passing score on the February examination. (#24, Exh. A ¶26 and Exh. A-13) In a letter dated May 2, 2002, the plaintiff wrote to Chief Justice Margaret Marshall of the Massachusetts Supreme Judicial Court ("SJC") seeking a hearing pursuant to S.J.C. Rule 3:01§5.3 with regard to her bar admission. (#24, Exh. A ¶27 and Exh. A-14[4]) In a May 8, 2002 letter Varad

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[3] The plaintiff asserts that she "had no notice of [her] need for a disability accommodation prior to January 18, 2002" and that the "Massachusetts Bar Exam testing documentation, packets, applicationss and special accommodations request forms and other accompanying information did not provide me with adequate notice of my need for a disability accommodation. (#4, ¶¶11-12) It is unclear precisely what Varad means by these statements. At the very least, she and not the BBE, would have knowledge of **her** "need" for a disability accommodation. If Varad's complaint is that the BBE's notice was inadequate, her statement is hardly sufficient to raise a genuine issue of material fact on that issue since Varad fails to point to any evidence as to how or in what respect notice was in adequate.

[4] The letter went on to say:

I am requesting a hearing because I have an arm that was very seriously injured in an accident and as a result of that injury I have difficulty writing by hand. I did not take the Bar examination under any special accommodations and I believe that a low essay score was the result of the extremely poor legibility of my handwriting. It is not within my physical power to alter the poor quality of handwriting and under the testing conditions presented by the essay portion of the Bar examination it becomes increasingly painful for me to write by hand. I have never considered myself to be disabled, and yet, the Bar examination is the rare situation in which I have no power to change the physical condition that is causing a poor test result on the essay portion of the examination.

I am being tested functioning under handicapped conditions not experienced by all other test takers. I believe that fairness would require a hearing on this issue. I am requesting that the Court schedule a hearing where I could have an opportunity to provide a physician's statement regarding the arm and the injury as it effects my abilities in regard to handwriting. It is my belief the re-taking the examination under the same conditions would only produce the same result. I would ask the Court to

informed the BBE that she had petitioned the SJC for "judicial review of the validity of the Board's actions in regard to its assessments of my aquirements and qualifications for admission as an attorney and to review the appropriateness of the Board's failure to provide accommodations for me as a test-taker on the essay portion of the Bar examination." (#24, Exh. A ¶31 and Exh. A-16)

The plaintiff's May 2nd letter was referred by Chief Justice Marshall to the Deputy Administrative Assistant of the SJC, Robert S. Bloom, (hereinafter"Bloom"). (#24, Exh. A ¶28) In a letter dated May 9, 2002, Bloom replied to Varad that "[t]he court does not consider granting hearings in cases where the applicant has not exhausted his or her remedies with the [BBE]. In your case, there is no indication in your letter that you made any formal request of the BBE." The letter further indicated that the plaintiff could not pursue a hearing under Rule 3:01 § 5.3 "without a written denial of relief from the [BBE]."(#24, Exh. A ¶29 and Exh. A-15)

Also on May 9th Barshak answered the plaintiff's May 8th letter to the BBE, noting "that the BBE's "records do not indicate that [she] requested special accommodations for either of the two exams that [she] failed." (#24, Exh. A ¶ 32) Further on May 9th Varad sent two more letters to the BBE, one in which she requested a copy of her essay answers from the February 2002 bar examination and a second in which she wrote:

> Following Mr. Bloom's direction, please consider this letter a formal request that relief be granted to me by the Board of Bar Examiners in regard to it's (sic) failure to accommodate me as a test-taker... Where I am not aware of any remedies yet available, I would like to suggest that one possible remedy might be a re-read of the essays already submitted under a grading standard that would function as an accommodation for an impaired test-taker. Another suggestion would be that the Board of Bar Examiners retest me through the employment of a multiple choice test as against the unfair standard imposed by the written essay testing format. I believe that Mr. Bloom's suggestion of engaging the use of a person

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allow a re-reading of the essay portion of my examination to ascertain if poor handwriting caused the resulting poor score on the essay portion of the exam. In the alternative, I would request that the Court allow me to re-take the essay portion of the Bar examination under conditions that would be fair to me as a test taker.
Memorandum In Support #24,Exh. A ¶ 27 and Exh. A-14

to write my answers for me would only function to impair my ability to fully respond to an essay question and would continue to unfairly assess my acquisitions and qualifications for admission. Memorandum In Support #24,Exh. A ¶34 and Exh. A-17.
In response to a May 10th telephone call from Varad, Barshak wrote that he had nothing further that he could tell her. (#24, Exh. A ¶35 and A-18) Copies of all the BBE correspondence with the plaintiff was forwarded to the SJC. (#24, Exh. A ¶ 36)

In a letter to Varad dated May 28, 2002, Chief Justice Marshall wrote that

> I have reviewed your correspondence with the Board of Bar Examiners and with staff of this court. Upon consideration of all the materials, I must conclude that your request for a hearing must be denied for failure to state a claim upon which relief can be granted.
>
> As you know, if you decide to take a future Massachusetts bar examination, you can request that the Board of Bar Examiners provide special accommodations in order to alleviate your test-taking problem.

Plaintiff's Memorandum #25, Exh. W.

On June 7, 2002, the plaintiff filed a "Request for a Stay of the Dismissal of the Petition of [Plaintiff] for Admission to Practice as an Attorney.." with the SJC. (#25, Exh. C) Treating Varad's filing as a motion for reconsideration of her May 30th decision, Chief Justice Marshall denied the request. (#25, Exh. U)

III. The Summary Judgment Standard

Summary judgment is "a device that 'has proven its usefulness as a means of avoiding full-dress trials in unwinnable cases, thereby freeing courts to utilize scarce judicial resources in more beneficial ways.'" *Mullin v. Raytheon Co.*, 164 F.3d 696, 698 (1 Cir., 1999) (quoting Mesnick v. General Electric Co., 950 F.2d 816, 822 (1 Cir., 1991)). The party moving for summary judgment "bears the initial burden, which may be discharged by pointing to the absence of adequate evidence supporting the nonmoving party's case." *Michelson v. Digital Financial Services*, 167 F.3d 715, 720 (1 Cir., 1999). After the moving party has met its burden, "the onus is on the nonmoving party to present facts that show a genuine issue for trial." *Michelson*, 167 F.3d at 720.

When considering whether to grant summary judgment, the Court must determine whether:

> ... the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is a genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Fed. R. Civ. P. 56(c).

In making this assessment, the Court must "accept all reasonable inferences favorable to the nonmovant." *Mullin*, 164 F.3d at 698; see also *Feliciano v. State of Rhode Island*, 160 F.3d 780, 788 (1 Cir., 1998); *Hinchey v. Nynex Corp.*, 144 F. 3d 134, 140 (1 Cir., 1998); *Dykes v. Depuy, Inc.*, 140 F.3d 31, 33 (1 Cir., 1998).

A factual dispute which is neither "genuine" nor "material" will not survive a motion for summary judgment. *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 248 (1986). In deciding whether a factual dispute is "genuine," the Court must determine whether the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Id.; *see also Fajardo Shopping Center, S.E., v. Sun Alliance Insurance Company of Puerto Rico, Inc.*, 167 F.3d 1, 7 (1 Cir. 1999) ("[A]n issue is 'genuine' if the evidence presented is such that a reasonable jury could resolve the issue in favor of the nonmoving party"); *De-Jesus-Adorno v. Browning Ferris of Puerto Rico*, 160 F3d 839, 841-42 (1 Cir., 1998)("A trial worthy issue exists ... [if] the evidence is 'sufficiently open-ended to permit a rational factfinder to resolve the issue in favor of either side.'");*Feliciano*, 160 F.3d at 784; *Hodgens v. General Dynamics Corp.* 144 F.3d 151, 158 (1 Cir., 1998) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-325 (1986)). In weighing whether a factual dispute is "material," the Court must examine the substantive law of the case, because "only disputes over the facts that might effect the outcome of the suit under governing law will properly preclude the entry of summary judgment." *Anderson*, 477 U.S. at 248; see also *De-Jesus-Adorno*, 160 F3d at 841-42 ("A trial worthy issue if the evidence is such that there is a factual controversy pertaining to an issue that may affect the outcome of the litigation under the governing law"); *Fajardo Shopping Center, S.E.*, 167 F3d at 7 (citing Pagano v. Frank, 983 F.2d 343, 347 (1Cir., 1993)). "Thus the substantive law defines which facts are material." *Sanchez v. Alvarado*, 101 F.3d 223,227 (1 Cir., 1996) (citing *Anderson*, 477 U.S. at 247-48).

Rule 56 does not permit the party opposed to the summary judgment motion to rest upon the mere allegations or denials in its own pleadings. See *Mulllin*, 164 F.3d at 698 (quoting *Wynne v. Tufts Univ. Sch. of Med.* 976 F.2d 791, 794 (1 Cir., 1992), cert. denied, 507 U.S. 1030 (1993)) ("Its essential role is to 'pierce the boilerplate of the pleadings and assay the parties proof in order to determine whether trial is actually required.'"). Rather, Rule 56(c):

> Mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existance of an element essential to the party's case, and on which the party will bear the burden of proof at trial.

Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

IV. Discussion

The merits of the plaintiff's claim under Title II of the ADA shall be the first to be addressed. Although the defendant advances several reasons why summary judgment should be granted, only one argument need be discussed.[5]

In Massachusetts the BBE is a creature of statute. See Mass. Gen. L. c. 221 § 35, The power with which the BBE is endowed is also granted by statute:

> Said Board may, subject to the approval of the supreme judicial court, make rules with reference to examinations ofr admission to the bar and the qualifications of applicants therefor, and

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[5] The defendant has not raised the Eleventh Amendment as a basis for seeking judgment as a matter of law given the uncertainty of the law on this point. Indeed, as recent events indicate, the law remains in flux. On April 7, 2002, the Supreme Court dismissed the writ of certiorari that had been granted in the Nineth Circuit case addressing the sovereign immunity issue. See *Medical Board of California v. Hason*, 123 S.Ct. 1779 (2003). As noted in the defendant's papers, the First Circuit has withdrawn a panel decision discussing the interplay of the Eleventh Amendment and Title II of the ADA (*Kiman v. New Hampshire Department of Corrections*, 301 F.3d 13 (1Cir., 2002)), granted the petition for rehearing en banc (*Kiman v. New Hampshire Department of Corrections*, 310 F.3d 785 (1 Cir., 2002)) and then stayed further proceedings in light of the grant of certiorari in the *Hason* case, *Kiman v. New Hampshire Department of Correction*, 311 F.3d 439 (1 Cir. 2002). To date the First Circuit has taken no further action in the *Kiman* case following the April 7th dismissal of the grant of certiorari in *Hason*.

determine the time and place of such examinations, and conduct the same, provided, that any applicant for admission to the bar who is a graduate of a college or who has complied with the entrance requirements of a college, or who had fulfilled for two years the requirements of a day or evening high school or of a school of equal grade, shall not be required to take any examination as to his general education; and provided, further, that no applicant for an examination for admission to the bar shall be restricted as to the number of times he may take such an examination...
Mass. Gen. L. c.221 §36.
Although great deference is accorded to BBE decisions regarding the qualifications of applicants, the SJC "retain[s] the inherent and exclusive jurisdiction over any decision to admit an attorney to the practice of law in this Commonwealth." *Wei Jia v. Board of Bar Examiners*, 427 Mass. 777, 782, 696 N.E. 2d 131, 136 (1998). See also Mass. Gen. L. c. 221 § 37; *In the Matter of Prager*, 422 Mass. 86, 89, 661 N.E.2d 84, 91 (1986) (While deference is given to the decision of the board, this court retains ultimate authority to decide a person's fitness to practice law in the Commonwealth.").

The BBE requires that those applicants who claim to have a disability which impacts their ability to sit for the bar examination request an accommodation in writing seventy-five days prior to the examination date. The timing of such requests affords the BBE the opportunity reasonably to assess the applicant's disability and arrange for an appropriate accommodation. There is no dispute that "[t]he BBE routinely provides reasonable accommodations to applicants who submit timely and complete Special Accommodation forms documenting the need for an accommodation of testing conditions." (#24, Exh. A ¶ 39)

Title 42 U.S.C. § 12132 provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." Assuming without deciding that Varad is, in fact, a "qualified individual with a disability," her claim must nevertheless fail as she has not demonstrated that the BBE has excluded her from participation in the bar examination or that she was denied the benefits of the BBE's services by reason of her disability.

The simple fact is that the plaintiff did not follow the instructions that she admittedly had received on two occasions, i.e., prior to both

the July 2001 and the February 2002 bar examinations, from the BBE.[6] She never made a written request to be accommodated for a disability with regard to the February 2002 bar examination. She never completed the Special Accommodations Petition forms "to provide details and documentation relating to a disability," including an Authorization and Release Form. She never had the Professional Declaration completed by a treatment professional on her behalf. The Professional Declaration, Form D of the Petition for Special Testing Accommodations,

> [m]ust be completed by the applicant's treatment specialist(s) describing the type and extent of the handicap or disability, and specifying the effect of the disability or handicap on an otherwise qualified applicant's ability to be examined. Professional declarations based on examinations or tests more than three years prior to the application may be denied for that reason alone. Therefore, it is advisable to present professional declarations based upon declarations based upon more recent examinations or tests. You may be required to submit to independent diagnostic testing at your expense by a doctor of the Board's choice. You will be advised if this will be required.

Memorandum in Support #24, Exh. A ¶ 23 and Exh. A-11.

It is true that Varad did make an oral request for accommodation in a telephone call to the BBE on January 18, 2002, more than a month after the December 17, 2001 deadline to file a written request. However, that verbal request was too little, too late, leaving the BBE without the time or the information necessary to make a reasoned judgment with respect to the alleged disability. Despite her best efforts, Varad cannot somehow transform her own "failure to follow instructions and submit timely requests" (#24 at 15) into a failure by the BBE to provide an accommodation as required by the ADA.[7]

To summarize, the plaintiff was given notice of the procedures for requesting an accommodation when she applied to take both the July

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[6] Varad does not contend that her purported disability in any way affects her ability to read, comprehend and follow written instructions.

[7] The plaintiff's reliance on 29 C.F.R. Part 1630 (REGULATIONS TO IMPLEMENT THE EQUAL EMPLOYMENT PROVISIONS OF THE AMERICANS WITH DISABILIES ACT] is inapposite given the purpose of Part 1530 is "to implement [T}itle 1 of the Americans with Disabilities Act (42 U.S.C. 12101, et seq..)." 29 C.F.R. § 1630.1 (emphasis added)

2001 and the February 2002 bar examinations. Varad completed all ten essay answers on the July 2001 examination and never mentioned a need for an accommodation. When plaintiff reapplied for the February 2002 examination, she did not submit a written request for an accommodation, but only made an oral request on January 18, 2002, well past the December 17, 2001 deadline. Varad again completed all ten essay answers on the February 2002 exam. Based on these facts, the SJC determined that Varad had failed to state a claim for which relief can be granted, essentially determining that the plaintiff was not entitled to a hearing until all her available remedies had been exhausted, namely, formally requesting an accommodation pursuant to the BBE's rules. On these facts, Varad has not made out a claim under Title II of the ADA because she has proffered no evidence to show that she had been excluded from participation in or denied the benefits of the defendant's services by reason of a disability.

The remaining claims require minimal discussion and so shall be addressed in short order. Title III of the ADA, 42 U.S.C. §§12181-12189, prohibits "discrimination...[in]public accommodations provided by private entities." *Olmstead v. L.C. by Zimring*, 527 U.S. 581, 589 (1999). Since the BBE is a public, not a private, entity, Title III of the ADA is simply inapplicable, and the plaintiff's claim under that part of the statute must fail.

Finally, the plaintiff's claims under the Massachusetts General Laws chapter 93§103 and Article 114 of the Massachusetts Constitution shall be addressed in tandem. In relevant part § 103 provides that

> [a]ny person within the commonwealth, regardless of handicap or age... shall, with reasonable accommodation, have the same rights as other persons...to the full and equal benefit of all laws and proceedings for the security of persons and property, including, but not limited to, the rights secured under Article CXIV of the Amendments to the Constitution.

Mass. General L .c. 93§103.

Specifically referenced in §103, Article 114 of the Massachusetts Constitution reads: ART. CXIV. No otherwise qualified handicapped individual shall, solely by reason of his handicap, be excluded from participation in, denied the benefits of, or be subject to discrimination under any program or activity within the commonwealth." MA CONST Amend. Art. 114.

The defendant argues, correctly, that Varad's claims are barred by the exclusivity provision of the Mass. Gen. L. c. 151B. When examining "the relationship between G.L. c. 151B...and G.L. c. 93, §102 and § 103 (equal rights act)", the SJC had occasion to explain that:

> The plaintiff contends that the equal rights act provided alternative remedies for employment discrimination in concert with c. 151B. We do not agree. We base our decision on the language of c. 151B, legislative intent, and our precedents interpreting its scope. Chapter 151B creates an administrative procedure for the enforcement of antidiscrmination statutes of the Commonwealth. As this court has stated, "The clear purpose of G.L. c. 151B is to implement the right to equal treatment guaranteed to all citizens by the constitutions of the United States and the Commonwealth.'

Charland v. Muzi Motors, Inc., 417 Mass. 580, 582, 631 N.E.2d 555, 557 (1994)(citations omitted).

Chapter 151B mandates that plaintiffs must bring their actions to the Massachusetts Commission Against Discrimination ("MCAD") within six months of the alleged discriminatory act. In the administrative scheme, "the election to pursue a claim of discrimination in court applies only after the first step of filing with the MCAD." *Charland*, 417 Mass. At 585, 831 N.E.2d at 558. Since there is nothing in the record to indicate that Varad filed a timely complaint with the MCAD, a fortiori she cannot now pursue her chapter 93 § 103 and Article 114 claims in court.[8]

V. Conclusion

For reasons stated, it is ORDERED that the Motion By Edward J. Barshak For Summary Judgment (#24) be, and the same hereby is, ALLOWED. Judgment shall enter for the defendant.

/s Robert B. Collings
May 15, 2003 United States Magistrate Judge

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[8] In *Charland,* the plaintiff relied on that portion of Mass. Gen. L. c. 93§103, which guarantees equal treatment regardless of "age." In the instant case, Varad relies on that portion of the same statute which guarantees equal treatment regardless of "handicap." The holding of the *Charland* case is applicable regardless of which guarantee forms the basis of the relief sought. Whether a claim is based on age or handicap, filing with the MCAD is a condition precedent to bringing suit.

Appendix 27

United States Department of Education
Office of PostSecondary Education
50 United Nations Plaza-Region IX
San Francisco, CA 94102-4987

SanFrancisco Service Center

August 30, 2003

Christine Varad
88 Greenfield Lane
Scituate, MA 02066

RE: False Certification
Appeal ASA

Dear Ms. Varad:

This letter acknowledges receipt of your appeal of American Student Assistance (ASA) denial of your student loan discharge due to a disqualifying status that was in existance at the time of your attendance. You are requesting loan discharge due to a physical or mental condition, or a legal status, existing at the time of enrollment, which would have prevented you from finding employment in the field of study.

Student borrowers who had a physical, mental, or legal status or condition at the time of enrollment that would have prevented the student from satisfying the requirements for employment in his or her field of study may be eligible for false certification loan discharge. However, it is the responsibility of the applicant to provide evidence that, at the time of enrollment, a status existed that by reason bo a State regulation, barred his or her employment in the field of study.

1. Documentation demonstrating a status or condition based on a physical or mental condition, age, or criminal record that would bar employment in the field of study;
2. A copy of a State statute or regulation that provided that the condition or status would prevent satisfaction of the requirments of te State in which the student resides which the loan was made for performance of the occupation for which the program of instruction was designed to prepare the student; and
3. Evidence that the condition or status in question existed at the time of enrollment and that the school was aware of it.

Although you have not provided the documentation requested, it does not appear that your situation qualifies for cancellation under the definition of "disqualifying status". The repayment of student loan obligations is not contingent upon the successful completion of the program of study nor does the student loan program guarantee that borrowers will benefit from it finacially. The Program onlly requires that schools properly certify the student's ability to benefit and eligibility to borrow. It is important to note that even physically challenged students can participate in the student loan program, if otherwise qualified.

In reviewing your case, the United States Department of Educatiohn has concluded that you have not established that the school wrongly certified your eligibility to borrow. You have not shown that the state's legal requirements barred your employment in your field of study due to your physical condition.

As a result of this determination, you continue to be responsible for repayment of the loans. If you are not currently repaying your loans, you should make arrangements for repayment immediately by contacting the holder of your loan, i.e. lender or guaranty agency, If your loans are not already in default, failure to begin or resume repayment could result in your loans being declared in default. Loans that remain in default can be collected by wage garnishment, tax refund offset, and litigation. Default may also cause a negative credit rating.

For additional information regarding this matter, you may contact ASA at:

American Student Assistance
330 Stuart Street
Boston, MA 02116-5292
800-999-9080

Sincerely,
/s K. Azam
K. Azam
Loan Analyst

Cc. ASA/social security number omitted